

1 JOSEPH P. RUSSONIELLO (CABN 44332)
United States Attorney

2 BRIAN J. STRETCH (CABN 163973)
Chief, Criminal Division

3 ANDREW S. HUANG (CABN 193730)
Assistant United States Attorney

4
5 1301 Clay Street, Suite 340S
Oakland, California 94612
Telephone: (510) 637-3680
7 Facsimile: (510) 637-3724
E-Mail: andrew.huang@usdoj.gov

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9 Attorneys for Plaintiff

10 UNITED STATES DISTRICT COURT
11 NORTHERN DISTRICT OF CALIFORNIA
12 OAKLAND DIVISION

13 UNITED STATES OF AMERICA,) No. CR 08-0367 DLJ
14 Plaintiff,)
15 v.) UNITED STATES' SENTENCING
16 LEONARD B. AUERBACH,) MEMORANDUM
17 Defendant.) Hearing Date: November 14, 2008
Hearing Time: 10:00 a.m.
18

19 The United States, by and through its counsel, Joseph P. Russoniello, United States
20 Attorney for the Northern District of California, and Andrew S. Huang, Assistant United States
21 Attorney, hereby supports the recommendation of the United States Probation Office and
22 requests that defendant Leonard B. Auerbach be sentenced to (1) 180 months imprisonment, the
23 statutorily mandated minimum term, (2) followed by a lifetime term of supervised release, (3)
24 pay a \$200,000 fine, which is the high end of the advisory range under the Sentencing
25 Guidelines, (4) pay restitution in the amount of \$178,000, which is to be divided \$100,000 to the
26 National Center for Missing and Exploited Children and \$78,000 to the minor victim in this case
27 and to be disbursed at the sole discretion of the United States government, (5) forfeit \$270,000 in
28 money judgment, and (6) pay a \$100 special assessment. As agreed upon by the parties in

1 paragraphs 10 and 11 of the Plea Agreement, respectively, the government also requests that the
2 Court include, as conditions of defendant's supervised release, restrictions upon defendant's
3 travel outside of the United States and a condition that any law enforcement officer may search
4 the defendant's property at any time of the day or night, with or without cause. Finally, the
5 government, requests that language provided in the Attachment be included in the judgment and
6 commitment order with respect to restitution. Taking into consideration the factors listed under
7 18 U.S.C. § 3553(a), including the applicable Sentencing Guidelines, the requested sentence is
8 warranted for the reasons states below and supported by facts contained in the presentence report.

I. BACKGROUND

10 Defendant Auerbach engaged in a sexual relationship with a minor victim, whose date of
11 birth is in April 1992, beginning at least as early as September 2004, when the victim was 12
12 years old, and continuing until as late as April 2007, when the victim turned 15. Throughout the
13 time of the relationship, defendant took sexually explicit photographs and videos of the victim.
14 Defendant Auerbach is a wealthy American businessman while the victim is from an
15 impoverished area of Costa Rica.

16 On April 8, 2008, defendant was charged by information in the Northern District of
17 California (Court No. CR 08-0227), with violating 18 U.S.C. § 2423(c) (Engaging in Illicit
18 Sexual Conduct in Foreign Places) and 18 U.S.C. § 2252(a)(4)(B) (Possession of Child
19 Pornography). Defendant failed to appear for his initial appearance and arraignment, which was
20 scheduled for April 9, 2008 at 10:00 a.m. As a result of defendant's flight from justice, the
21 government expended considerable time and resources. Defendant was ultimately apprehended
22 in Cuba where the Cuban government detained him for close to six weeks before expelling him
23 to the United States. Costa Rican government records indicate that the victim also traveled from
24 Costa Rica to Cuba in April 2008, shortly after defendant failed to appear in Court.

25 On June 4, 2008, a grand jury indicted defendant on charges of violating 18 U.S.C.
26 §§ 2423(b) and (c) (Travel with Intent to Engage in and Engaging in Illicit Sexual Conduct in
27 Foreign Places), 18 U.S.C. § 2251(c) (Production of Child Pornography), and 18 U.S.C.
28 § 2252(a)(4)(B) (Possession of Child Pornography). On August 29, 2008, pursuant to his Plea

1 Agreement with the government, defendant pleaded guilty to Production of Child Pornography,
 2 as charged in Count Three of the Indictment.

3 II. CONDITIONS OF SUPERVISED RELEASE

4 A. Travel Restrictions

5 In the Plea Agreement, defendant agreed to the following condition of supervised release:

6 [I]n addition to any restrictions placed upon me as terms of my supervised release,
 7 that I will not travel outside of the 50 United States and the District of Columbia
 8 ("international travel"), except for instances of family illness or death, religious
 9 reasons, or business reasons. To engage in international travel for these excepted
 10 reasons, I must present documentation of these reasons to my probation officer
 11 and receive advance approval.

12 Plea Agreement ¶11. The government, accordingly, requests that the Court include the following
 13 condition of supervised release:

14 Notwithstanding any other condition of supervised release, the defendant shall not
 15 travel outside of the 50 United States and the District of Columbia ("international
 16 travel"), except for instances of family illness or death, religious reasons, or
 17 business reasons. To engage in international travel for these excepted reasons, the
 18 defendant must present documentation of these reasons to the United States
 19 Probation Office in advance and obtain advance approval.

20 Child sex tourism is an ever-increasing worldwide problem. Predatory international travelers
 21 successfully exploit children in Third World countries, such as Costa Rica, by exploiting the
 22 children's impoverished situations. During the government's investigation, witnesses related that
 23 the defendant boasted to them about his sexual exploits in Costa Rica, including the opportunity
 24 to have sex with minors. During his flight from justice, the defendant demonstrated his contempt
 25 for laws prohibiting sex with minors by sending e-mails from Cuba to friends and acquaintances
 26 in the United States, railing against such laws as "cultural imperialism." The requested travel
 27 restriction would, therefore, serve as an appropriate and reasonable control on the defendant
 28 while deterring others who abuse their right to travel internationally.

29 B. Search and Seizure

30 Defendant also agreed to the following condition of supervised release:

31 [T]o submit my person and property to search and seizure at any time of the day
 32 or night by any law enforcement officer, with or without a warrant. I waive any
 33 applicable rights I might have to be free from such search and seizure and agree to
 34 make my submission to such search and seizure, with or without cause, a term of
 35 my supervised release.

1 Plea Agreement ¶ 10. Considering this defendant's offense of conviction and in light of the
 2 Ninth Circuit's decision in United States v. Betts, 511 F.3d 872 (9th Cir. Dec. 14, 2007), the
 3 government requests that the following this condition should read as follows:

4 The defendant shall submit his person, residence, office, vehicle, or any property
 5 under his control, including computers and digital storage media, to a search.
 6 Such a search shall be conducted by a United States Probation Officer or any
 7 federal, state, or local law enforcement officer at any time with or without cause.
 8 Failure to submit to such a search may be grounds for revocation; the defendant
 9 shall warn any residents that the premises may be subject to searches.

10 In Betts, the Ninth Circuit upheld a substantially similar (and, the government submits,
 11 identical in effect) search clause, even though the defendant in that case had no criminal history.
 12 In doing so, the Ninth Circuit relied on Samson v. California, 547 U.S. 843, 126 S.Ct. 2193
 13 (2006), which held that a similarly worded condition imposed upon all parolees in California did
 14 not violate the Fourth Amendment even though the condition did not require reasonable
 15 suspicion. See Betts, 511 F.3d at 876 (citing Samson, 547 U.S. at ___, 126 S.Ct. at 2202). The
 16 Ninth Circuit noted that in Samson, the Supreme Court had considered the high risk of
 17 recidivism for people convicted of crimes and reasoned that a reasonable suspicion requirement
 18 would give parolees greater opportunity to anticipate searches and hide criminal conduct. See
 19 Betts, 511 F.3d at 876 (citing Samson, 547 U.S. at ___, 126 S.Ct. at 2201). Because there was
 20 "no sound reason for distinguishing parole from supervised release" with respect to this
 21 condition, and noting that the Court in Samson even drew the analogy to supervised release, the
 22 expansive search condition not requiring reasonable suspicion was appropriate. Id.; see also
 23 United States v. Hanrahan, 508 F.3d 962 (affirming the imposition of a suspicionless search
 24 condition of supervised release after felon-in-possession conviction).

25 Such a condition of supervised release is appropriate in the present case, principally to
 26 prevent recidivism. In fact, the high recidivism rate of possessors of child pornography has been
 27 cited as the reason for why Congress expanded the maximum term of supervised release to life
 28 for child pornography offenders. See United States v. Allison, 447 F.3d 402, 405-407 (5th Cir.
 29 2006). Furthermore, the Internet and the nature of digital storage has made it possible for
 30 collectors and distributors of child pornography to do so anonymously, in high volume, and still
 31 evade detection. Illicit images may be downloaded, viewed, stored in hidden locations,

1 duplicated an infinite number of times at little cost, and deleted, only to be downloaded all over
2 again in a short period of time with little additional cost. Consequently, searches at "reasonable
3 times" and based upon "reasonable suspicion" may not serve as an effective control or deterrent.

4 III. RESTITUTION

5 The parties agreed that defendant will pay \$178,000 in total restitution, with \$78,000 to
6 be paid to the minor victim. The evidence indicates that defendant was able to exploit the victim
7 with the full complicity of the victim's adult family members. To mitigate further exploitation of
8 the victim, the government intends to make arrangements for the purchase of an annuity that will
9 disburse monthly payments of with a lump sum disbursement when the victim reaches 25 years
10 of age. To date, however, the government has not successfully located the victim to make
11 arrangements for restitution payments. The government, therefore, proposes that the language
12 contained in the Attachment be included in the judgment and commitment order and that the
13 Court sentence defendant accordingly with respect to restitution.

14 IV. CONCLUSION

15 For the reasons stated above, the government respectfully requests that the Court accept
16 the parties' Plea Agreement and sentence the defendant to (1) 180 months imprisonment, the
17 statutorily mandated minimum term, (2) followed by a lifetime term of supervised release, (3)
18 pay a \$200,000 fine, which is the high end of the advisory range under the Sentencing
19 Guidelines, (4) pay restitution in the amount of \$178,000, which is to be divided \$100,000 to the
20 National Center for Missing and Exploited Children and \$78,000 to the minor victim, (5) forfeit
21 \$270,000 in money judgment, and (6) pay a \$100 special assessment. The government further
22 requests that the Court include the travel restrictions and search and seizure conditions of
23 supervised release that were agreed upon by the parties and detailed above. Finally, the
24 government requests that the Court order payment of restitution to the minor victim in a manner
25 consistent with the language in the Attachment to this Memorandum.

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1 DATED: November 10, 2008

Respectfully submitted,

2 JOSEPH P. RUSSONIELLO
3 United States Attorney

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5 ANDREW S. HUANG
Assistant United States Attorney

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ATTACHMENT

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Proposed language for inclusion in the Court's judgment and commitment order:

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Defendant shall execute an annuity contract with Allstate International Assignment Company ("Allstate") providing a stream of payments for the minor victim in this case as restitution. The present value of that annuity contract shall be \$78,000, and that shall be the amount of restitution ordered for the minor victim. Defendant is ordered to execute any and all documents required by Allstate and the United States Attorney's Office to accomplish this transaction.

5

Defendant shall make his \$78,000 restitution payment directly to Allstate and not through the Clerk of the Court. Once the payment has been made and proof supplied to the Clerk of the Court, the restitution judgment with respect to the minor victim shall be considered paid in full.

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The annuity contract with Allstate shall provide for monthly payments to the minor victim of not less than \$100 per month up to her 25th birthday, with the residual balance being disbursed as a lump sum to the minor victim at that time. The United States Attorney's Office shall have discretion to set the exact amount of the monthly payment and the lump sum payment, in consultation with Allstate. Given the exigencies of this case, all payments by Allstate shall be made to the minor victim directly (through appropriate banking channels) and not to a conservator or legal guardian.

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The United States Attorney's Office is directed to provide the minor victim's name, date of birth, address, and other documentation required to the Clerk's Office and to Allstate.

8

If the victim's contact information and personal information is not available and the annuity contract has not been executed by December 1, 2009, defendant shall pay the \$78,000 directly to the Clerk of the Court, and his restitution obligation with respect to the minor victim shall be deemed satisfied. The minor victim thereafter can make application to the court for those funds upon proof of identity.

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